FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 8 1947
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 262

N. L. HUDSON, ET AL.,
Petitioners,

vs.

GULF REFINING COMPANY, ET AL.,
Respondents.

RESPONSE TO THE PETITION FOR CERTIORARI AND SUPPORTING BRIEF THEREON

J. MORGAN STEVENS,
Jackson, Mississippi;
ELLIS B. COOPER,
Laurel, Mississippi,
Attorneys for Respondents.

J. R. BUCHANAN,
A. S. SCOTT,
BEARD AND PACK,
Laurel, Mississippi;
STEVENS AND CANNADA,
Jackson, Mississippi,
Of Counsel.

INDEX

Subject Index

	Page
I. Parties to the litigation	1
II. Opinion below	2
III. Statement of the matter involved	2
IV. Questions involved	22
V. Brief and argument	26
1. The Motion to Dismiss Without Prejudice Was Properly Overruled Under State Policy and Procedure	26
2. No Violation of the Due Process Clause of the Federal Constitution	27
3. No Violation, Article III, Sec. II, Paragraph 1; Petitioners Had No Constitutional Right to Litigate in the Federal Court, and Even If They Had They Waived That Right By Submitting Their Cause Voluntarily to the State Court	31
4. The Federal Court Had No Jurisdiction Because of the Pendency of This State Court Action	32
5. A State Court's Decision Based Upon a Non-Federal Ground Will Not Be Reviewed by This Court, Even Though There Were Errors in Administering a State Statute	42
6. Additional Response to Assignments Argued by Petitioners in Their Printed Brief	44
A. Counsels' Argument II, Page 49	44
B. Calling a Special Term and Forcing Petitioners to go to Trial in the Face of "Threats and Armed Guards"	45
C. Counsels' Argument III, Page 56; In Proceeding to Judgment Against Petitioners On an Ex Parte Hearing at a Time When the Case Was Not Triable Because of the Absence of Necessary Parties	46

Page

D. Counsels' Argument IV, Page 58; In Proceeding to a Trial on the Merits When Mississippi Practice Permitted Only Dismissal With Prejudice, After Petitioners Declined to Proceed Further.. 47
E. Counsels' Arguments V-X, Inclusive, Page 60, Et Seq. 47
VI. Conclusion 48

CASES CITED

Adams v. *Commercial Co.*, 113 Miss. 608, 74 So. 435.. 26
American Land Co. v. *Zeiss*, 219 U. S. 47, 55 L. Ed. 82 29
Andrews v. *Swartz*, 156 U. S. 272, 39 L. Ed. 422..... 45
Angel v. *Bullington*, 91 L. Ed. 557..... 48
Appleby v. *Buffalo*, 221 U. S. 524, 55 L. Ed. 838..... 29
Bell Teleph. Co. v. *Pennsylvania Pub. Utility Commrs.*, 309 U. S. 30, 60 Sup. Ct. 411, 84 L. Ed. 563 30
Bonner v. *Gorman*, 213 U. S. 86, 53 L. Ed. 709..... 29
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673, 50 Sup. Ct. 451, 74 L. Ed. 1107..... 30
C. & A. R. R. Co. v. *Union Rolling Mill Co.*, 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081..... 26
Calcote v. *Texas Pac. Coal and Oil Co.*, 157 F. (2d) 126, Certiorari Denied, 91 L. Ed. 80..... 42
Caldwell v. *Texas*, 137 U. S. 692, 34 L. Ed. 816..... 28
Central Land Co. v. *Laidley*, 159 U. S. 103, 40 L. Ed. 91 29
Chicago & Alton R. R. Co. v. *Union Rolling Mill Co.*, 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081..... 16
Chicago, etc., R. R. Co. v. *Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979..... 31
Converse, In Re, 137 U. S. 624, 34 L. Ed. 796..... 28
Cooper v. *Lewis*, 2 Phill. Chan. 181..... 26
Crowell v. *Randall*, 10 Pet. 368, 9 L. Ed. 458..... 25
Empire Trust Company v. *Brooks*, 232 Fed. 641.... 33
Erie R. R. Co. v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487..... 43
Farmers' Loan & Trust Company v. *Lake Street Elevated R. Co.*, 177 U. S. 51, 44 L. Ed. 667, 20 Sup. Ct. 564 38

Page

Flournoy v. *Wiener*, 321 U. S. 253, 64 Sup. Ct. 548, 88 L. Ed. 708 31

Harkin v. *Brundage*, 276 U. S. 36, 72 L. Ed. 457, 48 Sup. Ct. 268 38

Heck v. *Nicholas*, 6 F. (2d) 10 49

Herb v. *Pitcairn*, 324 U. S. 117, 65 Sup. Ct. 459, 89 L. Ed. 789 30

Hibben v. *Smith*, 191 U. S. 311, 48 L. Ed. 195 31

Holley v. *Lawrence*, 318 U. S. 518, 63 Sup. Ct. 394, 87 L. Ed. 434 30

Honeyman v. *Haman*, 300 U. S. 14, 81 L. Ed. 476 43

Iowa, etc., R. Co. v. *Iowa*, 160 U. S. 389, 40 L. Ed. 467 28

Kentucky Union Co. v. *Kentucky*, 219 U. S. 140, 55 L. Ed. 137 29

Kline v. *Burke Construction Co.*, 260 U. S. 226, 67 L. Ed. 226, 43 Sup. Ct. 79, 24 A. L. R. 1077 35

Leeper v. *Texas*, 130 U. S. 462, 35 L. Ed. 225 28

Lent v. *Tillson*, 140 U. S. 317, 35 L. Ed. 419 42

Lowry v. *Silver City Gold and S. Min. Co.*, 179 U. S. 196, 45 L. Ed. 151, 21 Sup. Ct. 104 13

Marchant v. *Pennsylvania R. Co.*, 153 U. S. 380, 38 L. Ed. 751 28

Marrow v. *Brinkley*, 129 U. S. 179, 32 L. Ed. 654 29

Millsaps v. *Bond*, 64 Miss. 453, 1 So. 506 26

Minnesota v. *National Tea Co.*, 309 U. S. 551, 60 Sup. Ct. 676, 84 L. Ed. 920 29

Mitchell v. *Film Transit Co.*, 13 So. (2d) 154, 194 Miss. 550 ..... 12, 26

Neblett v. *Carpenter*, 305 U. S. 297, 59 Sup. Ct. 170, 83 L. Ed. 182 30

Northern v. *Scruggs*, 118 Miss. 363, 79 So. 227 26

Ong Chang Wing v. *United States*, 218 U. S. 272, 54 L. Ed. 1040 29

Pacific, etc., Co. v. *Lewis*, 241 U. S. 440, 60 L. Ed. 1084, 36 Sup. Ct. 637 38

Penn. Gen. Casualty Co. v. *Pennsylvania*, 294 U. S. 189, 79 L. Ed. 850 41

Peoples Bank v. *Pennington*, 137 Miss. 653, 102 So. 386, Suggestion of Error, 103 So. 144 26

Page

Powers v. *Blue Grass Building and Loan Association*, 86 Fed. 705 33
President, etc., of Bowdoin College v. *Merritt*, 59 Fed. 6 36
Pullman Palace Car Co. v. *Central Transp. Co.*, 171 U. S. 138, 43 L. Ed. 108, 18 Sup. Ct. 808 ..... 15, 16, 26
Radio Station WOW v. *Johnson*, 326 U. S. 120, 65 Sup. Ct. 1475, 89 L. Ed. 2092 30
Rogers v. *Peck*, 199 U. S. 425, 50 L. Ed. 256 28
Shivers v. *R. R.* (C. C.), 4 Fed. 97 26
Standard Oil Co. of California v. *Johnson*, 316 U. S. 481, 86 L. Ed. 1116 43
State v. *Hemmingway*, 69 Miss. 491, 10 So. 576 26
Stirling v. *Seattle, etc., Rwy.*, 198 Fed. 913 37
Westfeldt v. *N. C. Mining Co.*, 166 Fed. 706 38

AUTHORITIES CITED

American Jurisprudence, Volume 36, Section 47 13
Annotations:
84 L. Ed. 925 31
63 L. R. A. 572 31
Gibson, Suits in Chancery 15
Griffith, Mississippi Chancery Practice:
Sections 534, 535 26
Section 682 45
Section 686 45
Mississippi Code of 1942:
Section 755 6
Section 1659 9
Moore's Federal Practice, Volume 3, 1946 Supplement, Page 48 31
Restatement of the Law, Conflict of Laws:
Section 48 25
Section 83 25

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 262

N. L. HUDSON, ET AL.,

Petitioners,

vs.

GULF REFINING COMPANY, ET AL.,

Respondents.

RESPONSE TO THE PETITION FOR CERTIORARI AND SUPPORTING BRIEF THEREON

I

Parties to the Litigation

Petitioners for Certiorari were the Complainants in the State Court action filed by them in the Chancery Court of the First Judicial District of Jasper County, Mississippi, and from an adverse decision in said Court were Appellants in the Supreme Court of Mississippi.

The Respondents are all parties owning or having any interest in the litigation involved in the suit and Defendants to said State Court action.

This response is on behalf of Talmadge D. Lewis and Annie Lewis, his wife, and their eight children, four of

whom are minors represented herein by their Guardian, Thomas Melvin Lewis; Cora B. Myers Bradford, individually and as Guardian for her children, Clifton Myers, Simon Myers, and James Myers, minors; Mason Newell, individually and as Guardian for Alfonso Newell, Juanita Newell, and Mason Newell, Jr., minors; Claudius Newell; Paul Ellis Newell; George J. Leiderman; T. B. Corley; Carrie Kelly Husband and her husband, Norman Husband; Jettie Kelly Windham and her husband, George Windham; Marjorie Jones and her husband, Ab Jones; and Mrs. Mamie M. Abney; all of whom, with others, were parties defendant in the State Court and Appellees in the Supreme Court of Mississippi.

II

Opinion Below

The report of the Opinion of the Supreme Court of Mississippi is accurately stated by Counsel for Petitioners at Page 3 of their Petition for Certiorari and Brief in Support Thereof, and is copied in full by them, Appendix Page 82.

III

Statement of the Matter Involved

The Respondents believe that a full and fair statement of the issue presented in the State Court, and the decision of the State Court is all that is required to demonstrate that this Court should not grant certiorari.

On June 10, 1944, the lands involved in this suit were in the possession of and occupied by several families, both white and colored, including chiefly the Respondents, Talmadge Lewis and Annie Lewis, his wife, and eight children; Mason Newell and members of his family; Jettie Kelly Windham and George Windham; Carrie K. Husband and

Norman Husband, her husband, and members of their family; P. R. Bethea and wife; Cora B. Bradford and Clifton Myers, having so occupied for long periods of time under full claim and color of title, as shown by the record in this case.

A few days prior to June 10, 1944, aforesaid, oil was discovered on the land, and the T. D. Lewis Unit No. One was brought in as a producer. On said June 10, 1944, Petitioners herein, as Complainants, filed their Bill of Complaint in the Chancery Court of the First Judicial District of Jasper County, Mississippi in Cause No. 398, wherein and whereby they sought as against all of the record owners and claimants, to obtain the following alleged equitable relief:

They alleged that the lands at one time belonged to their ancestor, N. L. Hudson, and that said N. L. Hudson in his life time, sometime in the year 1878 or 1879, conveyed the lands to his wife, Mrs. M. E. Hudson, for and during the time of her natural life, and at her death to the children of N. L. Hudson for life, and at their death the remainder to the children of the said children (R. 7-8); and "that the original of this deed has been lost, destroyed or misplaced and cannot be found after diligent search and inquiry but complainants allege on information and belief that the defendants hereinbefore named, or some of them, have either the original or a copy of said instrument in their possession." Also, that N. L. Hudson executed and delivered a warranty deed to his wife in the year 1880 for and during the term of her natural life and at her death to the heirs of his body, and that this deed was filed for record and recorded, but that the record of the said last named deed was destroyed "when the Court House burned at Paulding, Mississippi on September 10, 1932 and that said deed has not been refiled," and complainants attached as an exhibit an alleged substantial copy of the deed; that N. L. Hudson

departed this life intestate on the 26th day of January, 1895 while residing on the land, leaving the alleged surviving heirs of his body as named in paragraph 8 of said bill.

The Bill then details certain conveyances executed by Mrs. M. E. Hudson, one in August, 1897 and one in 1899, but claimed that the conveyances, while absolute in form, had the legal effect of conveying only the alleged life estate of Mrs. Hudson, and that all subsequent grantees in the chain of title acquired only a life estate. The theory of the Bill is that all who acquired title through Mrs. Hudson acquired only her life estate, and at the death of Mrs. Hudson in 1928 became tenants at sufferance.

The Bill charges that the Respondent, Gulf Refining Company, had a mineral lease from some of the defendants, and had brought in a valuable oil well on one 40 acres of the land, and that the Gulf Refining Company, hereafter for brevity referred to as the Gulf, completed a well on or about May 20th, 1944, and is wrongfully claiming seven-eighths of the minerals, under its lease, and that the Complainants are entitled to a temporary injunction, "enjoining and restraining the said Gulf Refining Company from paying out any part of the royalty under the said land to any of the defendants, or from converting to their own use any part of the seven-eighths of the said oil, gas and other minerals produced from said land." It is also charged that one acre of the land was embraced in the forty acres upon which the oil well known as the Lewis-Morrison Well was completed as a second producer of the Gulf, and that the Gulf "is depleting and drawing oil from the said one acre of land, and that they became, were and are liable to complainants for their prorata value for all of said oil heretofore produced, or to be produced from the said well, pending the final determination of this lawsuit" (R. 66-67).

Let it be stated here that the only full and complete copy of the transcript served on us is a typewritten copy, filed

pending motion by Petitioners to be relieved from the requirements of the Rules, and therefore it becomes necessary for us to refer to the typewritten pages of the record if we at all comply with the requirements to respond within twenty days. Not waiving, therefore, any of the requirements of the Rules, or conceding that the Petitioners have the right to present their petition without complying with the Rules, we proceed to do the best we can with the record before us, discharging our duty to the Respondents.

The prayer of the bill in the state courts was for an accounting for the oil that had been produced or sold from the wells; for a decree for all of said oil, or the value of all of said oil; that the lands "will be decreed to be the property of complainants, together with all oil produced therefrom"; that from time to time "as the equities of the case may require, temporary injunctions and restraining orders or other process to protect the rights of all parties hereto pending the final determination of this cause" shall issue; and that "upon final hearing that this court will grant writs of possession, where necessary, to put the complainants in possession of all or any part of the said land" (R. 68); also, that the Court "will adjudge and decree that the complainants are the owners in fee simple of the lands * * * and that this Court will cancel all of the instruments insofar as the same purport to attempt to convey any part of said lands or any interest therein" (R. 67).

The Bill shows further that it is an equitable proceeding to establish an alleged lost instrument, a deed or deeds, upon which the alleged title of the Petitioners rest; to remove clouds from the alleged title of the Petitioners; for a decree adjudging the complainants to be the true owners in fee of the lands and the minerals; for an accounting for all minerals produced or to be produced pending litigation, and for ultimate possession, through the process of the court, if necessary and proper, canceling all the title deeds

upon which the defendants, the Respondents herein, claim as alleged clouds upon the alleged title of the Petitioners.

Under this Bill, Lis Pendens Notice thereof was recorded, as expressly provided for by Section 755, Mississippi Code of 1942. This statute reads as follows:

> "When any person shall begin a suit in any court, whether by declaration or bill, or by cross-complaint, to enforce a lien upon, right to, or interest in, any real estate, unless the claim be founded upon an instrument which is recorded, or upon a judgment duly enrolled, in the county in which the real estate is situated, such person shall file with the Clerk of the Chancery Court of each county where the real estate, or any part thereof, is situated, a notice containing the names of all the parties to the suit, a description of the real estate, and a brief statement of the nature of the lien, right, or interest sought to be enforced. The Clerk shall immediately file and record the notice in the lis pendens, record and note on it and in the record, the hour and day of filing and recording."

The effect of this lis pendens notice was to make it impossible for any of the landowners or lessors in the mineral leases to realize upon the royalties due them under the terms and provisions of their leases, or to negotiate sales of mineral interests pending the litigation.

Answers were filed by all of the defendants, and by their answers Respondents, as defendants in the state court, set forth the title deeds under which they claimed ownership, plead gross laches on the part of the complainants, and estoppel to lay claim or assert a claim based upon the alleged deed charged to have been executed way back in 1878 or 1879; plead also, and relied upon title by adverse possession.

The mineral lessees, the Gulf and the Tidewater Associated Oil Company concluded that by virtue of the unusual averments of the bill, the purpose of which was to place all

of the present owners and lessors of mineral rights in the status of tenants at sufferance, they could not continue to spend thousands upon thousands of dollars to develop this producing oil area, as they were obligated to do under and by virtue of the terms of the mineral leases taken from these respondents, without exposing themselves to the hazards of losing every dollar thereafter invested. In this situation these companies decided to purchase protection as indemnity against any such ultimate heavy losses, and accordingly negotiated for so-called protective leases. The Gulf took a so-called protective lease from the Hudsons, dated December 15, 1944, paying therefor the tremendous price of Fifty Thousand Dollars ($50,000) cash. The Tidewater, likewise, took a protective lease dated May 18, 1945, paying therefor Six Thousand Dollars ($6,000) in cash.

Section 14 of the Gulf protective lease reads as follows:

> "It is understood and agreed notwithstanding any provision of this instrument apparently to the contrary that Lessee does not in any way admit that Lessors, or any of them, have any right, title or interest in or to the lands, or any of them, covered hereby, or to any of the oil, gas and other minerals in and under or that may be produced therefrom (unless and until Lessor establishes some title to or interest therein either by compromise settlement or final decree in the suit entitled N. L. Hudson, Et Al., Complainants, Versus The Gulf Refining Company, Et Al., Defendants, No. 398, Chancery Court for the First Judicial District, Jasper County, Mississippi), but on the contrary Lessee claims and asserts that it has good and valid title to all of the oil, gas, and other minerals in and under and that may be produced from the land described in this lease by virtue of oil, gas and mineral leases heretofore executed by T. D. Lewis and Annie Lewis, recorded in Oil Lease Book 2, Page 39; by Jettie Windham, G. R. Windham, Carrie Husband and Norman Husband, recorded in Oil Lease Book 2, Page 251; by Margiree Jones and Abb Jones, recorded in Oil Lease Book 2, Page 213; and by

Mason Newell, recorded in Oil and Gas Book 6, Pages 547-548, all references are to the records of the First Judicial District of Jasper County, Mississippi.

"It is further expressly agreed that Lessee has accepted and does accept this lease from Lessor not in recognition of the title or claim asserted by Lessor, but it has accepted and does accept this lease solely for the purpose of buying its protection to the title, or titles to the land covered hereby together with all the oil, gas and other minerals thereunder, or that may be or have been produced from said land under the terms of the herein above mentioned leases; and Lessee shall never be called upon to recede from its position that it now has and owns valid mineral leases covering all of said land; and it shall be just as free hereafter as it has been heretofore to assert that its Lessors named in this paragraph have and had good and valid title to the whole of the lands covered hereby, and to all of the oil, gas and other minerals thereunder at the respective date of execution of said leases; and, it is further agreed that the continued assertion of such contention by Lessee shall in no manner be deemed or construed a repudiation of the terms of this lease.

"And, further, notwithstanding any provisions of this lease apparently to the contrary, it is agreed and understood that Lessor shall not be entitled to and Lessee shall be under no obligation to pay to Lessor any of the royalty, or any part thereof, provided for herein unless and until in the suit entitled N. L. Hudson, et al., Complainants *vs.* The Gulf Refining Company, et al., Defendants, No. 398, Chancery Court for the First Judicial District, Jasper County, Mississippi, Lessor shall have established by a compromise settlement between the parties thereto, or by final decree of the court therein, that the Lessor herein is the owner of the lands and minerals hereby leased and involved in said suit or the owner of an interest therein."

A similar provision was incorporated in the Tidewater Lease in paragraph 12. These leases are reflected in the record at pages 614 and 628.

There were very important proceedings in the state court. Searching interrogatories were propounded, by authority of state law, to the Gulf, Mason Newell and George J. Leiderman. By these interrogatories the named defendants were required to file copies of their title deeds and all substantial facts with reference to their ownership. Their consciences were searched as to abstracts of title and title deeds, inquiry was made as to royalty checks, especially those to respondent, T. D. Lewis. All of those interrogatories were answered and became a part of the record. Not content with the information thereby derived through interrogatories, Complainants invoked the powers of the state court, under the provision of Section 1659 of the Mississippi Code of 1942, to inspect title deeds, abstracts, documents, etc. This statute reads as follows:

> "The court in which any action or suit is pending may, on good cause shown, and after notice of the application to the opposite party, order either party to give to the other, within a specified time, and on such terms as may be imposed, an inspection and copy, or permission to take a copy, of any books, papers, or documents in his possession or under his control containing evidence relating to the merits of the action or proceeding or of the defense thereto; and if compliance with such order be refused, such books, papers or documents shall not be given in evidence in the action or proceeding by the party so refusing; and the court may punish the recusant party for a contempt of court; and if a complainant, or plaintiff, fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of non-suit or dismissal; and if a defendant fails to comply with such order, the court may, on motion, give judgment or decree against him by default or confession."

Separate motions were made by the complainants against the principal defendants, including the two major oil com-

panies, for an order to inspect books and records. Among other things charged in the motion invoking the process of the court under this statute was the following:

> "That by reason of lapse of time and the destruction of the land records of the First District of Jasper County, Mississippi, in September, 1932, it is difficult to make the necessary proof to establish the truth of the averments of the respective parties to this suit and of the merits of the case, and that the truth can be established from the said books, records and documents in the possession and files of the said defendant, or under its control; and that a large amount of time in the trial of the case, as well as expense, will be saved if the complainants are vouchsafed the right given them by statute of inspecting the said books, records and documents and papers in the possession or under the control of the said defendant, containing evidence relating to the merits of complainants' action and of the defenses interposed thereto; * * *".

The motions were sworn to and set down for hearing in vacation of the Court, in Meridian, Mississippi, on March 15, 1945 (R. 521). A hearing was had, and testimony taken before the presiding Judge, and after a full hearing a decree was entered granting the motions in part and overruling them in other parts (R. 455-456).

By this decree, Respondent, Talmadge D. Lewis, was required to place in the hands of his attorney, for the inspection of Petitioners, all the original deeds, or conveyances describing any of the land involved in the suit and dated prior to September 10, 1932, the date the court house and records of Jasper County, Mississippi burned. Thirty days was allowed to inspect and take photostatic copies. A like order was made as to other defendants. Particular attention was directed to an important abstract of title made and certified by J. Madison Travis, Esq., prior to the burning of the court house. This abstract happened

to be in the possession of J. R. Buchanan, attorney for the defendant, and respondent, Mason Newell. It was made by Mr. Travis on or about January 6, 1922, and listed, among other conveyances, a deed from N. L. Hudson to Mary Hudson, his wife, dated January 23, 1880, and duly filed for record, and full right of inspection of said abstract and to take photostatic copy was awarded.

In the application for the right to inspect, Petitioners, as Complainants, charged on information, that the defendants had the original or a true copy of the conveyance relied upon by them, whereby, as alleged, Mrs. Mary E. Hudson acquired only a life estate. The defendants answered this motion and denied, under oath, having any knowledge of any such conveyance. The information and sworn denials had probative value on the merits of the litigation, and are important in considering whether the complainants had, as alleged, the unqualified right to dismiss their bill without prejudice. They went on a fishing expedition and got a water-haul! By this method of discovery it developed that no such deed was in the possession of any of the defendants, and furthermore, that there was an authentic abstract of title, made before the court house burned, and filed for record after the court house was destroyed by fire, as a part of the public records of the county, showing that N. L. Hudson made a deed absolute to his wife, whereby she had the right to sell and convey to the predecessors in title to the respondents.

The Petitioners invoked the writ of discovery to prove their case in the state court, and instead of proving their case brought to light dependable records which disproved their case and entitled the defendants to a decree on the merits. This fact is important when we bear in mind the Missisippi rule of law, hereinafter discussed, that in equity "When a case has proceeded to such a point, or when such steps have been taken that defendant has secured some sub-

stantial right, which would be destroyed by dismissal, it should not be permitted." *Mitchell* vs. *Film Transit Co.*, 194 Miss. 550, 13 So. 2d 154, the latest expresion of our Supreme Court on the subject.

After the case had been at issue on the voluminous pleadings, and after Gulf had made its answer a cross-bill, sought confirmation of its mineral leases as against the original complainant, and after the so-called Ridgeway Group had made their answer a cross-bill, and sought confirmation of their deed to mineral rights, and after this case had been pending from June 10, 1944 to on or about December 15, 1945, the Complainants filed a motion for a voluntary dismissal, which was successfully resisted by Respondents. Some of the original defendants filed written objections to the motion to dismiss, while others appeared and objected without answer in writing. The court took the motion under advisement, showing mature deliberation on his part. Among the grounds of objection, as shown by the written answers, were the contentions that this case had proceeded to that point where it would be prejudicial to the rights of the defendants to permit a dismissal.

Petitioners had voluntarily submitted themselves to the jurisdiction of the state court. They invoked that jurisdiction, and through lis pendens prevented Respondents from disposing of their valuable mineral rights, and from realizing on their royalties. It was affirmatively shown by evidence taken on the motion to dismiss that not a dime of royalty had been paid because of this law suit. That is the situation to-day and that is one reason we are resisting this wrongful application for certiorari.

A further ground of objection was based upon the provision of the so-called protective leases, in which, for a valuable consideration, Petitioners agreed that they would not be entitled to any royalties until, and unless, in that very case then pending on the Docket of the Jasper County Chan-

cery Court, and Numbered 398, it should be adjudicated that they owned the lands, or had some interest therein. We contended then and still contend that that agreement enured to the benefit of the privies of the mineral lessees, to-wit, the Gulf and the Tidewater, especially when we remember that the relationship between the lessor and the lessee in a mining lease is so intimate that ordinarily the lessor cannot acquire or assert an adverse title. 36 Am. Jur., Mines and Mining, Section 47; citing *Lowry* v. *Silver City Gold and S. Min. Co.*, 179 U. S. 196, 45 L. Ed. 151, 21 Sup. Ct. 104.

A further objection to the dismissal was the pendency of the cross-bill. Counsel for Petitioners do not and cannot argue that the original complainant in an equity suit can take a voluntary dismissal when there is an appropriate cross-bill seeking affirmative relief. We also contended before the Learned Chancellor that the complainants had been guilty of gross laches in asserting a stale claim. Upon their own theory of their bill they allege that upon the death of the alleged life tenant, Mrs. Hudson, they became absolute owners with the right of possession. The pleadings and the proof show that Mrs. Hudson died in 1928, approximately 16 years prior to the filing of the original bill, during all of which time Respondents were in possession, claiming full ownership and possession, and Petitioners did not make inquiry, pay taxes, or take any interest in the lands involved in this controversy until a valuable oil field had been developed thereon. In the meantime, witnesses having knowledge of the title and possession had died, the public records of the county had been destroyed and no effort was made by Petitioners, as alleged claimants, to avail themselves of the statutory remedy to have the title deeds refiled and re-recorded.

It was further contended that they were estopped by their agreement in the protective leases, whereby they agreed that the Chancery Court of the First Judicial District of

Jasper County, Mississippi in this very case, No. 398 on the Docket thereof, should be the final judge as to whether they were entitled to recover any royalties, and their right to recover royalties was expressly conditioned upon their obtaining an adjudication that they were the owners of the land, or some part thereof. They repudiated this agreement in their futile attempt to withdraw from the state court.

Learned Counsel have argued that their clients made a settlement with the mineral Lessees. It is true that they frightened the Lessees into the payment of large sums for protection, and this without the knowledge or consent of the real land owners, but the so-called settlement was in effect an agreement to submit to the state courts the decision of the rights of all parties.

When the State Court overruled the motion to dismiss without prejudice there was an effort to appeal to the Supreme Court of Mississippi by applying to Mr. Justice Griffith, Presiding Judge of Division B of the Supreme Court. The informal application was resisted, the right to appeal contested, oral arguments thereon presented, and memorandum of authorities supplied. Upon consideration the application was overruled by a memorandum in letter form, reading as follows:

"February 8, 1946.

"Mr. Ben Cameron, Meridian, Mississippi; Mr. J. R. Buchanan, Laurel, Mississippi; Messrs. Stevens & Stevens, Jackson, Mississippi.

GENTLEMEN:

Re: Application for Interlocutory Appeal in HUDSON v. GULF REFINING Co., Jasper County

"This matter was discussed with my associates yesterday afternoon, and it was the majority opinion, tentative of course, that, (1) The Chancellor was probably right in refusing the dismissal, and, (2) that the

appeal would be solely as regards the adjective law not allowable under the interlocutory appeals statute. Acting on that advice the application is denied.

"The papers left with me are rather voluminous. For that reason I would suggest that your respective associates here in Jackson call for them. Also that those of you addressed above notify all the other attorneys concerned.

Yours very truly,

V. A. GRIFFITH."

It will be observed that Judge Griffith took counsel with his associates and tentatively reached the conclusion then that the Learned Chancellor "was probably right in refusing the dismissal," and thereby Petitioners were warned in advance as to the final outcome on their contention that they had an unqualified statutory right to dismiss. The refusal to dismiss is supported by numerous cases hereinafter referred to, from Mississippi and other jurisdictions, all holding that the complainant in an equity case does not have, in all cases, the right to dismiss, but, on the contrary, where there has been any proceeding in the case, which has given the defendant any right against the complainant, the complainant cannot dismiss his case, as of course; or, as stated otherwise, when the defendant has secured some right by the filing of the bill, which would be destroyed by the dismissal of the bill. And, furthermore, there can be no voluntary dismissal of the original bill when there is a cross-bill or cross-demand. This set policy, as an important procedural matter, is rooted and grounded in all leading text books on equity pleading and practice, such as Mr. Daniel, Mr. Fletcher and other works on equity pleading and practice, and by Gibson in his *Suits in Chancery*, and by Judge Griffith of the Mississippi Supreme Court, in his oft-quoted work on Mississippi Chancery Practice, and proclaimed by the Lord Chancellor of England in *Cooper* v. *Lewis*, 2 Phill. Chan. 181; by this Honorable Court in *Pull-*

man Palace Car Company v. *Central Transportation Co.*, 171 U. S. 138, 43 L. Ed. 108; *Chicago & Alton R. R. Co.* v. *Union Rolling Mill Co.*, 109 U. S. 702, 3 S. Ct. 594, 27 L. Ed. 1081, and other like cases decided by this, and inferior federal courts and by state courts.

No better statement of the general rule is to be found than that announced by this Honorable Court in *Pullman Palace Car Co.* v. *Central Transpor. Co., supra.* The rule applies generally irrespective of whether the complainants are residents or non-residents; and the fact that the original complainants in this case were non-residents had not a whit to do with the decision of the Learned Chancellor in overruling the motion to dismiss.

This cause was triable at the January 1946 term of court, when the complainants presented their application to dismiss. They obtained wrongfully a continuance, due to the circumstances that the judge desired more maturely to consider the matter before acting thereon. Later, a special term was called, as by law authorized. Counsel are in error in conveying the impression that the Learned Chancellor called a special term to try this one case. It was called to try any and all cases on the docket of the court that were then triable, but the Learned Judge, as a special courtesy to counsel, specially notified all counsel that this case would be tried, and this by means of a confidential letter, in which a so-called threat was commented upon. The fact is that the docket of the Chancery Court of Jasper County, as well as the docket of the Chancery Courts of many counties where oil had been discovered in Mississippi had become congested by litigation growing out of this development, so much so that it led the Legislature of 1946 to create two new additional Chancery Court Districts to relieve this congestion.

We must respectfully take issue with Learned Counsel in several statements made in their supporting brief and

argument, and some implications conveyed by their statements.

Counsel contend that because of alleged threats they could not fairly present their case to the state court of Jasper County. The first mention of threats in this law suit was in the confidential letter of Judge Neville, addressed to all counsel, wherein the Learned Judge stated that it had come to his knowledge that certain parties interested in the case had made threats against certain witnesses, litigants and attorneys, but the Judge was careful to state "Of course, I have no personal knowledge that any such threats have been made, but it is my duty, as I see it, to see that all officers of the court, litigants and witnesses are protected." The Learned Chancellor acted upon information conveyed to him, and the purpose of his action was to guarantee to the complainants and their attorneys a fair trial. Let it be remembered that the presiding judge of an equity court in Mississippi is both judge and jury. Here we have a judge, as a judge, and a judge, as a jury, giving assurance of a fair trial.

The letter aforesaid was written by the Judge in vacation of the court, and this unusual charge about threats was never brought to the attention of the court while sitting as such, was not assigned by Learned Counsel for petitioners as any reason for dismissal, was never inquired into by the court at any of the many terms thereof, from the filing of the bill to the final trial thereof, and is based upon no evidence or affidavits of anyone, and does not in any wise intimate which, if any, of the multitude of the defendants could have made such wrongful statements. There is nothing in any pleading in this case with reference thereto, and the court was never called upon, as a court, to make any ruling in reference thereto. Furthermore, when the special term was called there was not, within our knowledge, any armed guard, and no one was searched in entering and

departing from the little court house. There was no evidence of any firearms of any kind, and no evidence of *any* untoward event, but, on the contrary, the trial of this case was as peaceful as the beautiful May day in which it was heard.

There is no basis whatsoever for the statement that petitioners desired to withdraw to "avoid threats and trial under armed guards," as stated in their summary of questions presented, page 15; paragraph F, page 19, and elsewhere in the petition for certiorari, and supporting brief thereon. There is no foundation for the statement, and specifications of errors, that they were required to submit to search, and to go to trial in an atmosphere of threats and intimidation. The only thing that this extravagant statement of counsel can be based upon is the letter from the Judge, and even in that the Judge does not say that he had ordered armed guards, but simply that he had requested the sheriff to exercise his statutory right to have twelve deputies present. No courts, either the circuit or chancery courts of Mississippi, are held in the absence of the sheriff, or his lawful deputies, and it is not infrequent to have a number of bailiffs to wait upon the court, and the mere presence of a number of bailiffs would be no evidence that a party to this litigation had overstepped the bounds in making any threats. It is an easy matter to make charges, and the whole argument of counsel is a lame effort to suggest some sensible reason for desiring to withdraw from the court, to which the petitioners had voluntarily submitted their case, and the court which in our judgment is the only court which had full jurisdiction of the subject matter and all of the parties. We submit that the letter from Judge Neville is no lawful part of the pleadings and proceedings in this case. It is a letter written by a judge in vacation of the court and is a confidential message to all counsel. Since Learned Counsel have, as we believe, stepped

out of the record to base their right to dismiss upon alleged threats, we feel that in justice to Respondents and to ourselves, as officers of the Court, and in justice to the state court, we are justified in directing the Court's attention to certain admitted facts which demonstrate that the motion to dismiss was not on account of alleged threats.

The motion to dismiss is dated December 12, 1945, (R. 605), and was not heard until the following January. The motion was overruled by the Learned Chancellor on January 18, 1946, (R. 721). Up to that time no reference to threats had been made by anybody. The letter from Judge Neville was dated March 26, 1946, (R. 730). It appears, therefore, that the only consideration given by the Judge to threats, if any, was not on the hearing to dismiss without prejudice, but was on a call of the Judge for a special term for the trial of the case, and the matter of threats was not made a basis or a motive for dismissal, either directly or indirectly. There is no evidence in the record that the Learned Judge was conscious of any alleged threats when he heard the motion to dismiss. He could not be expected to rule upon something not brought to his attention.

Furthermore, and beyond all this, we feel that since Learned Counsel has digressed from the record, that we are justified in calling to the attention of this Court the sworn testimony of Honorable Ben F. Cameron, one of the leading counsel for Petitioners, on the motion to dismiss the federal cases. We have before us a transcript of the evidence taken in the four consolidated cases in the United States District Court for the Eastern Division of the Southern District of Mississippi on March 14, 1946 in causes Nos. 270, 271, 272, and 278. Learned Counsel, as a witness, was asked if there was any desire on the part of the plaintiffs to abandon the court in Jasper County and transfer the cases to the Federal Court, and therein testified

that at the hearing before Judge Neville about the production of documents, his clients "were distinctly dissatisfied with what happened there, and said to us that day 'you will never win that case in this court' "; and the record shows that the hearing at Meridian, referred to by Mr. Cameron, was held on March 15, 1945, more than a year prior to the date of Judge Neville's letter, in which he stated threats were made; and, on the question of transfer Mr. Cameron stated: "We had discussed it in Meridian back in June or July when the hearing on the motion was held. We discussed then going into the federal court." Counsel is referring to the year, 1945.

Petitioners filed their actions in the United States District Court on December 11, 1945. In discussing the filing of the Federal Court suits, Mr. Cameron further testified that counsel for petitioners "incubated the idea and studied on the idea of probably going into federal court," and that, "We had weekly conferences for the best of five months." All of which is a complete demonstration that this alleged ground of threats was a fanciful aftermath, and is much ado about nothing.

Counsel for Petitioners have set forth the proceedings in the State Supreme Court, and have quoted the opinion. That opinion speaks for itself. It was written by a Judge who had had long service as a judge of the Chancery Court before his elevation to the Supreme Court. The application for an appeal from the interlocutory decree was presented to Judge Virgil A. Griffith, presiding Judge of Division B, a judge who had had actual experience as a Chancellor, and who had written a well known text book, in common use by the bench and bar in Mississippi, on Mississippi Chancery Practice.

There is no ground whatsoever, either of law or fact, for any implication that petitioners were required to submit their case to an unfair court, or that either the Chancery

Court or the Supreme Court failed to give to this case mature consideration, and that, upon all questions raised. The Supreme Court elected to place its decision fundamentally upon one ground, to-wit, that the pendency of the cross-bill was sufficient in itself to justify the overruling of the motion to dismiss without prejudice.

A casual reading of the opinion shows that the Supreme Court of Mississippi was clearly of the opinion that Respondents were entitled to a trial upon the cross-bills, and that the effect of the decree on the cross-bill was to adjudicate against the original complainants every issue which could have been adjudicated upon the original bill. The Court, after holding that the cross-bills were properly retained, and there was no error in granting a hearing on them without the attendance of cross-defendants, who purposely absented themselves, then said: "This brings us back to the original bill—whether it should have been dismissed, retaining the cross-bills. This, as it seems to us, has now become, as to all practical purposes, a moot question. Under the cross-bills every issue and question, which could have been determined under the original bill, were adjudicated against the original complainants and cross-defendants in favor of cross-complainants and their privies. Thereby the whole matter has now become *res adjudicata*. *Von Zondt* v. *Town of Braxton*, 149 Miss. 461, 465, 115 So. 557; *Watkins* v. *Mississippi State Board*, 170 Miss. 26, 32, 154 So. 277. Upon similar principles see, also, *Griffith's Chan. Prac.*, Sections 263, 363, 571, 624.

> "In view of the foregoing announcement of our conclusion here, which completely determines the ultimate solution of the problem on the appeal before us, we do not deem it necessary to discuss other points, on both sides, ably argued in the several briefs filed.
>
> "The decree of the Chancery Court will, therefore, be and is affirmed."

It is needless to say that in rendering this opinion the Supreme Court here was dealing purely with state questions.

IV

Questions Involved

Petitioners base their claim for relief under the due process and equal protection clause of the Fourteenth Amendment of the Constitution of the United States and under Article III, Section II, Paragraph 1 of the Constitution of the United States. Under the due process and equal protection clause, they undertake to assign fourteen grounds to sustain a federal question, and under Article III, aforesaid, undertake to state six grounds for relief.

Their contention under the due process clause appears to be based upon the following erroneous contentions:

1. The state court denied due process and equal protection to petitioners in refusing to sustain their motion to dismiss without prejudice, because (a) they did not have a fair trial because of threats and so-called armed guards; (b) because they had filed four separate suits in the Federal District Court and had an absolute right, as asserted, to dismiss their cases in the state court, in order to transfer controversy to the Federal Court; (c) because they were put to trial upon a cross-bill that had not been served under state practice; and (d) because, as alleged, they had made a settlement with cross-complainants, and there was nothing to adjudicate on the cross-bill.

2. Under Article III of the Constitution the assignment is similar and raises almost identically the same questions. We submit that the sole question here involved is whether the action of the state equity court, having full jurisdiction of the subject matter, and the parties, by refusing to permit a voluntary dismissal of the original bill, without prejudice,

at a time when the complainants had instituted suits upon the same cause of action in the Federal District Court, and the affirmance of that decree by the Supreme Court of Mississippi, in an opinion based upon state decisions, policy and procedure, raises a federal question.

Respondents respectfully submit there exists no ground for the grant of the writ of certiorari in this case:

1. The jurisdiction of the state equity court to pass upon and overrule the motion of Complainants to dismiss without prejudice was full and complete, and every decision thereon was purely a state question, especially when important proceedings had taken place in the case, and had progressed to such a point that a dismissal of the original bill would be prejudicial to the interest of the defendants, and when there were cross-bills seeking affirmative relief.

2. The action of the state court in no way impinged upon the jurisdiction or authority of the Federal District Court, and could not have prevented petitioners from seeking relief in the Federal Court, regardless of the ultimate effect of a decision in either the state or Supreme Court, especially when the record shows that petitioners had already filed their action in the Federal Court when they moved to dismiss in the state court. The motion to dismiss called for a decision as to whether the state court would retain or surrender its jurisdiction, and it had a right to decide that question irrespective of any desire, or any action taken by the petitioners to prosecute the same cause of action in the Federal Court.

3. The jurisdiction of the state court had been voluntarily invoked by petitioners in an equity case, properly classified either as an action *in rem*, or at least *quasi in rem*, and had full jurisdiction of the subject matter and the parties, and full control of the *res*. Our contentions have been all along

that the Federal District Court could not take jurisdiction of this case, under the well known line of authorities, simply because the state court had prior and exclusive jurisdiction.

4. Conceding for argument that the Federal District Court was a court of concurrent jurisdiction, the fact that the petitioners desired to transfer from the state to the federal court, under all of the circumstances, in no way affected or restrained, or denied to petitioners their right to proceed concurrently in the federal court with the prosecution of their alleged claim.

5. The opinion of the Supreme Court affirming the State Chancery Court was based exclusively upon state questions, law, practice and procedure, and no federal question was presented, or decided.

6. If, as contended by petitioners, the Supreme Court erred in the reasons assigned for affirmance, the mere fact of an erroneous opinion would not raise a federal question, so long as it appears that the State courts had jurisdiction of the parties, and the subject matter.

7. There can be no contention that the Supreme Court of Mississippi decided this case upon an inadequate or an unsubstantial state question. On the contrary, it affirmatively appears that the opinion was based solely on state policy, practice and procedure.

8. It affirmatively appears, contrary to the contentions of the Petitioners, that the state court had jurisdiction of the Petitioners on the cross-bill. We say this for two fundamental reasons: (a) When a non-resident invokes the jurisdiction of a state court by bringing an action therein, he "subjects himself to the jurisdiction of the state as to the claim sued upon, and, if the law of the state so provides at the time the plaintiff brings his action, as to any set-off, counterclaim or cross-action brought against him by the defendant during the pendency of the first action." Re-

statement of the Law, Conflict of Laws, §83; and, (b) Petitioners appeared to the cross-bill and filed a demurrer thereto, and thereby entered their general appearance to the cross-action.

9. This was an action essentially to establish an alleged lost deed of ancient origin, in order to recover valuable lands, and it is elementary that immovable things, such as land, are subject to the jurisdiction of the state in which they are located. This was a local action, and by process of *lis pendens* the Chancery Court had full jurisdiction of the *res*. Restatement of the Law, Conflict of Laws, § 48.

10. Petitioners have utterly failed to show that the state court either had presented to it or decided, directly or indirectly, any federal questions, and this court can consider only federal questions passed upon by the state courts.

11. On this appeal "It is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown on the record that it did arise and was applied by the state court to the case." (Mr. Justice Storey in *Crowell* v. *Randall,* 10 Pet. 368, 9 L. Ed. 458. Therefore, all questions about alleged threats or armed guards, having no basis in any pleading or ruling of the court, are nowhere involved, either in the state equity court or before the Supreme Court.

12. There was no settlement of the controversy with the Gulf. The agreement reflected by the protective leases was an agreement in the progress of litigation, grew out of and referred to this very case, and provided on its face that Petitioners would be entitled to no royalty unless it was granted to them by the Chancery Court of Jasper County, in this very case, No. 398. The main effect of that agreement was to permit the Gulf to proceed with the development of the oil field without too much risk to itself.

V

BRIEF AND ARGUMENT

1

The Motion to Dismiss Without Prejudice Was Properly Overruled Under State Policy and Procedure

Griffith, *Mississippi Chancery Practice,* Paragraphs 534, 535;

Northern vs. *Scruggs,* 118 Miss. 353, 79 So. 227;

Peoples Bank vs. *Pennington,* 137 Miss. 653, 102 So. 386, Suggestion of Error, 103 So. 144;

Millsaps vs. *Bond,* 64 Mis. 453, 1 So. 506;

State vs. *Hemmingway,* 69 Mis. 491, 10 So. 576;

Adams vs. *Commercial Co.,* 113 Miss. 608, 74 So. 435;

C. & A. R. R. Co. vs. *Union Rolling Mill Co.,* 109 U. S. 702, 3 Sup. Ct. 594, 27 L. ed. 1081, (Cited by the Mississippi Supreme Court in *State* vs. *Hemmingway, supra,* and referred to in *Peoples Bank* vs. *Pennington, supra*);

Pullman Palace Car Co. vs. *Central Transp. Co.,* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. 808, (Cited with approval by the Mississippi Supreme Court in *Northern* vs. *Scruggs, supra*);

Shivers vs. *R. R.,* (C. C.), 4 Fed. 97;

Cooper vs. *Lewis,* 2 Phill. Chan. 181;

Mitchell vs. *Film Transit Co.,* 13 So. (2d) 154, 194 Miss. 550 (The latest expression of our Supreme Court on the right to dismiss).

We copy only one excerpt from this latest expression:

"It is true that the right of plaintiff or complainant to take a non-suit is large, nevertheless it is not unlimited. It is in the discretion of the court. When, in

any respect, a case has proceeded to that point, or when such steps have been taken that the defendant has thereby secured some substantial right which would be destroyed by the dismissal, it should not be permitted." (Citing authorities).

Surely the Federal Court would not entertain jurisdiction to determine whether the discretion so vested in the state court was properly or improperly exercised. We contended in the state court, and still contend, that Petitioners, or complainants, were estopped to dismiss, and likewise were guilty of laches. These are some of the grounds which the Supreme Court of Mississippi decided were now moot questions, in view of their decision to affirm the case because of the pendency of the cross-bills.

2

No Violation of the Due Process Clause of the Federal Constitution

We hesitate to burden the Court with the citation of the numerous decisions construing the Due Process Clause in cases similar to the case at bar. This Court is being asked to review the decision of a purely local action involving essentially the ownership of land located in Mississippi and construing state jurisdiction, practice and procedure. This case was tried just as if the complainants were residents of Mississippi. As non-residents they had the right to submit their cause to the state court and did so. After invoking the jurisdiction of the state court in the matter of discovery and inspection of title deeds, they concluded manifestly that the evidence developed through discovery disproved their case, and having frightened the mineral lessees into purchasing protection, and after making the important agreement arising out of and in the progress of the litigation that they would not be entitled to royalties until they

received a favorable decision from the state court in this identical cause No. 398, they wrongfully filed four separate suits in the Federal District Court on the same cause of action and sought to transfer the litigation from the state to the federal court by the process of seeking dismissal without prejudice. There is no provision under the constitution or laws, either state or federal, that permitted the original complainants to transfer their cause, voluntarily submitted by them, from the state court to the federal court.

The 14th amendment to the Constitution of the United States in no way undertakes to control the power of a state to determine by what process legal rights may be asserted, or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard, before the issues are decided. *Iowa &c. R. Co.* v. *Iowa,* 160 U. S. 389, 40 L. ed. 467; *Rogers* v. *Peck,* 199 U. S. 425, 50 L. ed. 256.

If all persons are treated alike under the law under the same circumstances, no person can be said to be deprived of equal protection of the laws. *Leeper* v. *Texas,* 139 U. S. 462, 35 L. ed. 225; *In re Converse,* 137 U. S. 624, 34 L. ed. 796; *Caldwell* v. *Texas,* 137 U. S. 692, 34 L. ed. 816.

If persons have the benefit of a full and fair trial in the several courts of their own states, where their rights are measured by general provisions of law applicable to all in like condition, and as a result are deprived of their property, it can not be said that such deprivation is without "due process of law." *Marchant* v. *Pennsylvania R. Co.,* 153 U. S. 380, 38 L. ed. 751.

When parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without tdue process of law, within the meaning

of the 14th amendment to the United States Constitution. *Central Land Co.* v. *Laidley,* 159 U. S. 103, 40 L. ed. 91.

When parties have been fully heard in the regular course of judicial proceedings, an erroneous decision does not deprive the unsuccessful party of his property without due process of law. *Bonner* v. *Gorman,* 213 U. S. 86, 53 L. ed. 709; *Ong Chang Wing* v. *United States,* 218 U. S. 272, 54 L. ed. 1040; *American Land Co.* v. *Zeiss,* 219 U. S. 47, 55 L. ed. 82; *Kentucky Union Co.* v. *Kentucky,* 219 U. S. 140, 55 L. ed. 137; *Appleby* v. *Buffalo,* 221 U. S. 524, 55 L. ed. 838.

In *Marrow* v. *Brinkley,* 129 U. S. 179, 32 L. ed. 654, Chief Justice Fuller for this Court said "unless it appears affirmatively that the decision of a federal question was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it, this court has no jurisdiction of a writ of error to a state court. In this case the judgment as rendered involved the decision of no such question, and none such was actually decided.

"Nor can jurisdiction be retained upon the suggestion, made for the first time in this court, that if the court of appeals, proceeding upon the principles of general law only, were found to have erred in the rendition of its decree, the State of Virginia had thereby deprived the plaintiffs in error of their property without due process."

"The Supreme Court of the United States will decline to review, on certiorari to a state court, a question asserted to arise under the Constitution of the United States where, because of uncertainty as to the precise grounds of the decision rendered by the state court, a review of the constitutional question is not clearly necessary to a decision of the case." *Minnesota* v. *National Tea Co.,* 309 U. S. 551, 60 S. Ct. 676, 84 L. ed. 920.

"The interpretation by the courts of a state of the written and unwritten laws of the state is not reviewable by the Supreme Court of the United States." *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 50 S. Ct. 451, 74 L. ed. 1107.

"A decision by a state court of last resort amounting merely to an erroneous construction of statutes of the state is not a denial of the due process guaranteed by the Fourteenth Amendment so as to be reviewable by the Supreme Court of the United States." *Neblett* v. *Carpenter,* 305 U. S. 297, 59 S. Ct. 170, 83 L. Ed. 182.

"The contention that a state court erred in its determination that there was evidence to sustain a finding does not present a Federal question." *Bell Teleph. Co.* v. *Pennsylvania Pub. Utility Comrs.,* 309 U. S. 30, 60 S. Ct. 411, 84 L. ed. 563.

"The Supreme Court of the United States will not review judgments of the state courts that rest on adequate and independent state grounds." *Herb* v. *Pitcairn,* 324 U. S. 117, 65 S. Ct. 459, 89 L. ed. 789.

"An appeal from a state court to the Supreme Court of the United States will be dismissed where the judgment below rests upon a non-federal ground adequate to support it." *Holly* v. *Lawrence,* 318 U. S. 518, 63 S. Ct. 394, 87 L. ed. 434.

"The Supreme Court of the United States will not review a state decision resting on an adequate and independent non-Federal ground even though the state court may have also summoned to its support an erroneous view of Federal law." *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 65 S. Ct. 1475, 89 L. ed. 2092.

"The Supreme Court of the United States will not review a state court's decision of a Federal question where it is doubtful whether the decision does not rest on a non-Federal

ground adequate to support it." *Flournoy* v. *Wiener*, 321 U. S. 253, 64 S. Ct. 548, 88 L. ed. 708.

In *Hibben* v. *Smith*, 191 U. S. 311, 48 L. Ed., 195, 201, this Court among other things said "The Federal courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a state applicable to all persons in like circumstances and conditions." See also annotation 63 L. R. A. 572; *Chicago, etc., R. R. Co.* v. *Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979; annotation, full and complete with abundant authority, 84 L. ed. 925.

3

No Violation, Article III, Sec. II, Paragraph 1

Petitioners Had no Constitutional Right to Litigate in the Federal Court, and Even if They Had They Waived That Right by Submitting Their Cause Voluntarily to the State Court.

It is needless for us to cite authorities on the general proposition that the jurisdiction of the Federal District Court is not the exercise of constitutional jurisdiction, but purely statutory authority. Also, that Petitioners had no constitutional rights to litigate in the Federal Court. Conceding that they had an option in the first instance to sue in the Federal Court, it is admitted that they had the right to sue in the State Court, and did so. When they filed their bill in the State Court they submitted themselves to the jurisdiction of that court for all purposes. In Moore's Federal Practice, under the new Federal Rules, Volume 3, 1946 Supplement, discussing the general topic, "Dismissal of Actions," on page 48 we find the following:

"Dismissal sought to frustrate removal—Some cases have held that the court in its discretion may sustain a plaintiff's motion for leave to dismiss a removed cause

where the purpose of dismissal is to defeat removal and get the action back into a state court. It has been said that the defendant has no absolute right to litigate in federal court. See Lawson *v.* Moore (W. D. Va. 1939) 29 F. Supp. 175; Welter *v.* E. I. DuPont De Nemours & Co., Inc. (D. Minn. 1941), 112 D. J. Bull. 19, 4 Fed. Rules Serv. 41 a.22, Case No. 3, 1 F. R. D. 551; Oblak *v.* Armour & Co. (W. D. Mo. 1941), 4 Fed. Rules Serv. 41 a.22, Case No. 2; Home Owners Loan Corp. *v.* Huffman (C. C. A. 8th, 1943) 134 Fed. (2d) 314 (dismissal after reversal and demand; no prejudice to defendant in having second trial in state court rather than federal court); McLean *v.* Wabash R. Co. (W. D. Mo. 1942), 7 Fed. Rules Serv. 41a22, Case No. 3; Mott *v.* Connecticut General Life Ins. Co."

We emphasize the statement made that the defendant has no absolute right to litigate in Federal court. Conceding, as stated, that Petitioners had a statutory right to invoke the jurisdiction of the Federal District Court, they ought not to be permitted to do so after voluntarily invoking the jurisdiction of the state court in a purely local action, properly classified as an action in rem, or at least quasi in rem. The State court had full jurisdiction of all parties, the entire subject matter and the control of the res. Whether they had a right, an absolute right, to dismiss in the State court is purely a State question. They had no unqualified right to dismiss, and that issue was decided against them, both in the lower State court and in the Supreme Court.

4

The Federal Court Had no Jurisdiction Because of the Pendency of This State Court Action

The original bill of complaint in this case shows that the original complainants, after experimenting and invoking the jurisdiction of the State court, and after impor-

tant proceedings had taken place and the cause had arrived at that stage when it would be prejudicial to the rights of the defendant to permit a dismissal without prejudice, then filed their motion to dismiss for the very purpose of transferring jurisdiction to the Federal court. They undertook to break the State court action by filing four cases, and to submit the same issues for the determination of the Federal court in four parts, but the parties are the same, the essential nature of the suit is the same, and the fundamental relief prayed for is the same. The Federal court had no jurisdiction for two reasons, first, because of the prior jurisdiction of the State court over the land sued for, and secondly, the plaintiffs in the Federal court omitted from their bills many indispensable parties.

On the first reason assigned it is well settled that where property is in the actual or potential possession of a court of competent jurisdiction, such possession cannot be interfered with by process of another court.

Empire Trust Company v. *Brooks,* 232 Fed. 641, 648, defines the essential nature of the conflict of jurisdiction between courts of concurrent jurisdiction:

> "It means that the issues involved, relief prayed for and the parties to the two suits are so substantially alike that the lis pendens of the last brought is included in the first."

An examination of the pleadings in both suits leaves no doubt that the two suits are so much alike that the *lis pendens* of one includes the other, and a decision in one will be binding in the other.

Another fair definition of the rule will be found in *Powers* v. *Blue Grass Building and Loan Association,* 86 Fed. 705, as follows:

> "The principle that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be interfered with by process out of

another court is well settled. Buck *v.* Colbath, 3 Wall. 334; Krippendorf *v.* Hyde, 110 U. S. 276; Sup Ct. 27; Byers *v.* McAuley, 149 U. S. 608, 13 Sup. Ct. 906; Compton *v.* Railroad Co., 31 U. S. App. 486-523-530, 15 C.C.A. 397, and 68 Fed. 263. There are two classes of cases in which the court first obtaining jurisdiction should be suffered to proceed without any interference by process from another of concurrent jurisdiction. The first class consists of those cases in which the exercise of jurisdiction by one court will interfere with the prior possession of the res by another court of competent and concurrent jurisdiction. Prippendorf *v.* Hyde, 110 U. S. 276, 4 Sup. Ct. 27; Heidritter *v.* Oil-cloth Co., 112 U. S. 294, 5 Sup. Ct. 135; Byers *v.* McAuley, 149 U. S. 608, 13 Sup. Ct. 906. The second class is where there are two suits pending in different courts of concurrent jurisdiction, in which the parties are the same, and which involve and affect the same subject-matter, and where the jurisdiction of neither is complete nor effectual unless it may, if necessary or proper, exercise exclusive dominion over the res in litigation. The cases relied upon by counsel for defendants of Gates *v.* Bucki, 12 U. S. App. 69, 4 A.C.C.A. 116 and 53 Fed. 961; Meritt *v.* Barge Co., 24 C.C.A. 530, 79 Fed. 228; Zimmerman *v.* S. Relle, 25 C.C.A. 518, 80 Fed. 417; and Sharon *v.* Terry, 36 Fed. 337, are cases belonging to the latter class. The conflict exists in such instances because the suits are in the nature of suits in rem. The mere fact of the pendency of two suits in personam between the same parties and upon the same identical cause of action, in courts of different jurisdictions, does not make a case in which the jurisdiction of one is impeded or interfered with by the action of the other. Staunton *v.* Embry, 93 U. S. 548. To make a case of conflict, *the two concurrent suits must involve relief against the same res.* The distinction here drawn is recognized in the cases last cited, and is clearly indicated in Buck *v.* Colbath, 3 Wall. 334. If the parties are the same, and the issues are the same, and the relief sought involves dominion over the same res, and cannot be effectually granted if dominion over the res be taken by process

> from another court, it is a case where the second court should regard the jurisdiction of the first as exclusive, and hold its hands until the court first obtaining jurisdiction has terminated the case pending."

The fundamental decision upon this question is *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 67 L. Ed. 226, 43 Sup. Ct. 79, 24 A.L.R. 1077. There the construction company filed suit in the District Court alleging a breach of a contract to pave certain streets. Thereafter Kline filed suit in a state court upon the same contract against the construction company and its surety. Each of these suits was for the recovery of damages. Thereupon the construction company applied to the District Court for an order enjoining Kline from prosecuting the state case. The District Court denied the injunction. On appeal to the Supreme Court the Circuit Court of Appeals was reversed, the District Court was affirmed, and the injunction was denied. The Court pointed out that if a Federal Court has acquired jurisdiction of the subject-matter of a cause it may enjoin the parties from proceeding in a state court, where the effect of the action in the state court would be to defeat or impair the jurisdiction of the Federal Court. And the Court said:

> "Where the action is in rem, the effect is to draw to the Federal court the possession or control, actual or potential, of the res, and the exercise by the State court of jurisdiction over the same res necessarily impairs, and may defeat, the jurisdiction of the Federal court, already attached. The converse of the rule is equally true,—that where the jurisdiction of the state court has first attached, the Federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the State court's jurisdiction."

The Court pointed out that if the controversy was merely over a question of personal liability which did not involve

the possession or control "of a thing," an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending, but that each court is free to proceed, and when one has entered judgment, that judgment may be pleaded as a bar in the other case.

The Court said that the recognition of the exclusive jurisdiction of the court which first acquires jurisdiction over a particular matter is stronger than a mere recognition of the principle of comity, but "is a principle of right and law." And:

> "The rule is not limited to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate involvent estates, and in all suits of a like nature * * *. The rule is limited to actions which deal either actually or potentially with specific property or objects."

This principle, so thoroughly exemplified and developed in the *Kline* case, has been specifically applied in case to quiet title.

President, Etc. of Bowdoin College v. *Merritt,* 59 Fed. 6, arose on the following state of facts: The beneficiaries of a trust sought to enjoin Merritt from asserting claim to the trust property, and, says the Court, the purpose is "to quiet the title." Thereafter Merritt filed suit in a state court seeking the appointment of a receiver for the property. Thereupon plaintiff filed a supplementary bill in the Federal court to enjoin Merritt from prosecuting his proceeding in the state court. The injunction was granted because if Merritt "Should succeed in having a receiver appointed of the property, the jurisdiction of this Court would be very much embarrassed, if not defeated or impaired." The Federal

court had jurisdiction of the subject-matter of a suit to quiet title. The proceeding in the state court would have deprived it of jurisdiction already attached. That proceeding was therefore enjoined.

In *Stirling* v. *Seattle, Etc. Rwy.*, 198 Fed. 913, an action had previously been instituted in a state court in which certain frauds, wrongs and breaches of trust upon the part of certain trustees were alleged, and further, that a corporation was being used by certain of the defendants as an instrument for its own destruction and a receiver was appointed. An action was subsequently filed in the Federal court asking for the appointment of a receiver. It was held that the suit in the Federal court should be stayed pending final determination of the proceedings in the state court.

> "It is contended that the suit in the state court is not one in rem, but purely in personam. It may not be purely a suit in rem, but enough of its nature has been disclosed by the foregoing statement to show that, if the suit in this court should proceed to the dissolution of the corporation and the disposition of all of its property, and thereafter the plaintiff should prevail in the suit in the state court, the action taken by this court would have deprived him of much of the relief therein sought. There would be no property left to turn over to the corporation. It would have no franchise to protect. All of the elements of the trust would have been dissipated. The responsibility of the trustees and the beneficiaries to answer to a personal judgment, alone, would remain. The defendants, being residents of Illinois, even that benefit might, under certain circumstances, be lost. It is also apparent that, in order to effectually grant and insure to the plaintiff the relief sought by him, it might, in the course of proceedings, become necessary for the court to take charge of the property of the defendant railway company."

The limitations upon the length of a brief preclude us from citing other interesting applications of the doctrine of the *Kline* case. Some of those applications are to be found in *Farmers Etc. Co.* v. *Lake Etc. R. R.*, 177 U. S. 51, 44, L. Ed. 667, 20 Sup. Ct. 564; *Pacific Etc. Co.* v. *Lewis*, 241 U. S. 440, 60 L. Ed. 1084, 36 Sup. Ct. 637; *Harkin* v. *Brundage*, 267 U. S. 36, 72 L. Ed. 457, 48 Sup. Ct. 268; *Westfeldt* v. *N. C. Mining Co.*, 166 Fed. 706.

Mr. Justice Shiras in *Farmers' Loan & Trust Company v. Lake Street Elevated R. Co., supra*, dealt with a case where a bill had been filed in a Federal court to foreclose a mortgage. Subsequently, an action was commenced in the state court, and there was an injunction by the state court against proceeding in the Federal court, and a part of the opinion reads:

> "The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of coordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons.
>
> "Nor is the rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts. Peck *v.* Jenness, 7 How. 612, 12 L. Ed. 841; Freeman *v.* Howe, 24 How. 450 16 L. Ed. 746; Moran *v.* Sturges, 154 U. S. 256, 38 L. Ed. 981, 14 Sup.

St. Rep. 1019; Central Nat. Bank *v.* Stevens, 169 U. S. 432, 42 L. Ed. 807, 18 Sup. Ct. Rep. 403; Harkrader *v.* Wadley, 172 U. S. 148, 43 L. Ed. 399, 19 Sup. Ct. Rep. 119."

The rule of conflict of jurisdiction is likewise discussed by Judge Taft, speaking for the Supreme Court of the United States, in *Harkin* v. *Brundage, supra.* The case stated:

"The case presents a controversy between state court receivers and the receiver of a Federal court over the possession of the property and assets of the Daniel Boone Woolen Mills Corporation. It is here by certiorari to the judgment of the circuit court of appeals for the seventh circuit affirming a decree of the district court for the northern district of Illinois. The receivers in the state court were appointed on the prayer of what was called a stockholders' bill. The receiver in the Federal court was appointed on the prayer of what was called a creditor's bill. The receiver in the Federal Court was appointed first; but the bill in equity upon which the state court receivers were appointed was filed five days before the bill in the Federal Court. The receivers in the state court filed a motion in the Federal court requesting that the property in the hands of the Federal court receiver be transferred to the state court receivers, on the ground that the state court by the earlier filing of the bill in that court had acquired constructive possession and its receivers were entitled therefore to actual possession of the property."

The Court in part said:

"The principle which should govern in a conflict of jurisdiction like this has been a number of times stated by this court. As between two courts of concurrent and co-ordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of the property by filing the bill is entitled to retain it without interference and cannot be deprived of its right to do so,

because it may not have obtained prior physical possession by its receiver of the property in dispute; but where the jurisdiction is not the same or concurrent, and the subject-matter in litigation in the one is not within the cognizance of the other, or there is no constructive possession of the property in dispute by the filing of a bill; it is the date of the actual possession of the receiver that determines the priority of jurisdiction. Morgan *v.* Sturges, 154 U. S. 256, 283, 284, 38 L. ed. 981, 990, 991, 14 Sup. Ct. Rep. 1019; Palmer *v.* Texas, 212 U. S. 118, 53 L. ed. 435, 29 Sup. Ct. Rep. 230; Wabash R. Co. *v.* Adelbert College, 208 U. S. 38, 54, 52 L. ed. 379, 386, 28 Sup. Ct. Rep. 192; Farmers' Loan & T. Co. *v.* Lake Street Elev. R. Co., 177 U. S. 51, 61, 44 L. ed. 667, 671, 20 Sup. Ct. Rep. 564, and Adams *v.* Mercantile Trust Co., 15 C. C. A. 1, 30 U. S. App. 204, 66 Fed. 617. The difficulty in the application of the rule is in determining whether the conflicting jurisdictions are actually concurrent and the same. A doubtful question, too, is whether the bill is of such a character that its filing is the taking of constructive possession of the property.

"In Palmer *v.* Texas, the suit in the state court was an action by the state to forfeit the charter of the corporation and wind up its affairs. The suit in the United States court was an action by a stockholder to liquidate the corporation. Both were substantially alike in purpose. The state court had proceeded so far as to appoint receivers of the property and had merely delayed their taking possession until the case might be examined on appeal in the court above. The state court was held to be in constructive possession all the time, and was given priority of jurisdiction over the property as against the receiver of a Federal court who had taken actual possession under a subsequent bill.

"In Farmers' Loan & T. Co. *v.* Lake Street Elev. R. Co. the suit in the Federal court was an action to foreclose a mortgage, and the one in the state court sought to enjoin the foreclosure. In that case the controversies

were held to be substantially the same, and the filing of the bill in foreclosure in the Federal court was held to be a constructive possession of the property." • • •

"In this country, in which in every state we have courts of concurrent jurisdiction under the Federal and state authority, it is of the highest importance that conflict of jurisdiction should be avoided. It can only be avoided by forebearance and comity, and by enforcing upon the parties and counsel engaged the utmost good faith and the fullest disclosure in one jurisdiction with reference to what are the exact facts relevant to litigation in a corresponding case in the other."

See also *Penn. Gen. Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, 79 L. ed. 850, wherein Mr. Justice Stone recognized our dual judicial system, commented thereon, differentiated between suits in personnem and suits in rem, and reviewed some of the leading authorities. He stated "But if the two suits are *in rem* or *quasi in rem,* requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. • • • The principle, applicable to both Federal and State courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other." In the case at bar Petitioners in the state court claim full ownership of the land and prayed for writs of possession, as and when necessary, and placed of record a *lis pendens* notice, which under the state practice brought within the jurisdiction of the Chancery Court the control of the lands, as much so as if the sheriff of the county had pitched his tent thereon and held it for the court.

We say, therefore, upon the authorities, that our state court had prior and exclusive jurisdiction and is the only

court, in fact, which did have full jurisdiction of all the parties and all of the subject matter.

On the second proposition, that Petitioners omitted from the Federal court suits indispensable parties, the record shows, and they will not deny that they consciously omitted all residents of Louisiana and Texas, who were parties to the State court litigation, aand likewise omitted twenty acres of land involved in this suit. It is true that Judge Mize overruled our motion to dismiss in the Federal Court, but he did so upon the assumption, and certain authorities not now necessary to review, that he could by his decree confine the judgment to those persons who were then before his court, so long as he did not make any adjudication affecting the rights of those persons who had been consciously omitted, but, since Judge Mize's ruling the Circuit Court of Appeals has reversed the Learned Judge on the identical question involved, in *Calcote* v. *Texas Pac. Coal and Oil Co.*, decided July 31, 1946, 157 Fed. (2d) 216, Certiorari denied November 18, 1946, 91 L. Ed. 80 (Advance Opinion No. 1), rehearing denied, 91 L. Ed. 242 (Advance Opinion No. 3). Motions to dismiss in the Federal Court are now being renewed and have been set for argument before Judge Mize on September 29, 1947.

We confidently assert, therefore, that it would have been a futile thing to permit the Petitioners to dismiss without prejudice in the State court and to refile, or to proceed with their four actions, as stated, in the Federal court.

5

A State Court's Decision Based Upon a Non-Federal Ground Will Not Be Reviewed by This Court, Even Though There Were Errors in Administering a State Statute.

In *Lent* v. *Tillson*, 140 U. S. 317, 35 L. Ed. 419, headnote 4 reads:

> "Errors in administering a state statute, which do not involve jurisdiction of the subject matter, or of the parties, do not justify this court in reexamining a judgment of a state court, to hold that the state had deprived, or is about to deprive plaintiffs of their property without due process of law."

In *Honeyman* v. *Haman*, 300 U. S. 14, 81 L. Ed. 476, headnote 1 reads:

> "Before the Supreme Court of the United States can undertake to review a state court decision it must appear affirmatively from the record, not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause."

In *Standard Oil Co. of California* v. *Johnson*, 316 U. S. 481, 86 L. Ed. 1116, headnote 2 reads:

> "A state court's consideration of a State Statute based purely on local law is conclusive on the Supreme Court of the United States."

Let us bear in mind at this point that opposing counsel, through their petition and brief, wrongfully assumed that the complainant has an unqualified statutory right to dismiss his action in a State equity court. That question was decided against petitioners and practically all of the specifications of error are based upon that wrongful assumption. It would be absurd to assume that the United States Supreme Court should review the action of every State court in the nation to determine whether it rightfully or wrongfully refused a dismissal without prejudice. Especially is this true when we consider the impact of the rule announced in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, and the many decisions of this Court applying the doctrine that State Law and decisions bind the Federal Court.

6

Additional Response to Assignments Argued by Petitioners in Their Printed Brief

In overruling Petitioners' motion to dismiss without prejudice, Counsel state that it cannot be doubted that petitioners had an absolute right to dismiss. On the authorities and on the binding decision of the Supreme Court, this was a qualified right and fell within the numerous exceptions announced by text-book writers and by the decisions of Mississippi. What we have heretofore said in this response is sufficient. The observations of this Court in the *Pullman Palace Car Co.* case, *supra, is* here quite pertinent: "The denial of the motion was made in connection with the application of the Central Co. to file a cross-bill in which it would seek to avail itself of the tenders made by the Pullman Co. in the original bill. Such an application for leave to file a cross-bill seeking affirmative relief, while at the same time availing itself of those tenders of relief made by the original complainants, would furnish additional ground for exercise of the discretion of the court in refusing to grant the application for leave to discontinue."

A

Counsels' Argument II, Page 49

Counsel here undertake to assign two or three grounds in one:

> "In denying interlocutary appeal to settle Petitioners' right to dismiss and calling a special term and forcing Petitioners to go to trial in the face of threats and armed guards" etc.

We have quoted from the memorandum opinion of Judge Griffith denying the interlocutory appeal. One ground for the denial was, and is, the rule that there can be no inter-

locutory appeal from a decree overruling a motion to dismiss, which is purely a procedural matter. Of course, error can be assigned when the case reaches the Supreme Court on its merits. Counsel can cite no authorities in Mississippi upholding his right to appeal from an interlocutory order, procedural in its nature. Furthermore, due process of law has never required that a State shall provide for a review of any justiciable issue by an Appellate Court. This doctrine has been applied even in criminal cases. *Andrews* v. *Swartz,* 156 U. S. 272, 39 L. Ed. 422.

In Griffith's Chancery Practice, Section 686, it is said:

> "The statute as to appeals from interlocutory orders or decrees is as follows: 'An appeal may, in sound discretion, be granted by the Chancellor in term time, or in vacation, from any interlocutory order or decree, whereby money is required to be paid, or the possession of property changed, or when, having sustained or overruled a demurrer or motion, he may think an appeal proper in order to settle all the controlling principles involved in the cause, or in exceptional cases, to avoid expense and delay; * * * such appeal, if allowed, must be allowed by the court or Chancellor, and he shall determine whether the appeal shall operate as a supercedeas or not.' "

In paragraph 682 is a discussion of the general topic, "Interlocutory appeals generally not favored," and many illustrations given where the court properly overruled applications therefor.

B

Calling a Special Term and Forcing Petitioners to go to Trial in the Face of "Threats and Armed Guards"

The implication is that Judge Neville called a special term to checkmate Petitioners in their effort to proceed in the Federal Court, and that the special term was called for

the one purpose of trying this case. There is no basis for this conclusion, and there is no basis for alleged threats, and there were no "armed guards."

C

COUNSELS' ARGUMENT III, PAGE 56

In Proceeding to Judgment Against Petitioners on an Ex Parte Hearing at a Time When the Case Was Not Triable Because of the Absence of Necessary Parties.

Counsel are here undertaking to predicate error on the fact, as alleged, that Claudies Newell and Paul Ellis Newell were in the military service of the United States, and on behalf of some of the defendants, a motion to stay proceedings was filed. (See Appendix 15). The record shows that the joint answers of Mason Newell, Sr., individually, and Mason Newell, Sr., as guardian of the estates of the said named, soldiers, together with others, was filed, (R. 175). Not only was an answer filed on behalf of Claudies Newell and Paul Ellis Newell, but they were actually represented by their attorney, J. R. Buchanan, who appeared at the January, 1946, Term of Court and insisted upon a trial of the cause, and who objected to a dismissal without prejudice on behalf of his clients, and who, at the special term of the court stated: "We wish the court to proceed with the trial of the case." (Appendix, page 73). No decree was ever entered on the motion to stay, and if these soldiers had any rights based upon the Soldiers and Sailors Relief Act, to have the proceedings stayed, they obtained no order of the Court thereon, or any ruling thereon, proceeded to file their answer, and through their attorney insisted upon a trial of the cause. It does not now lie in the mouth of the Petitioners to complain of something which these defendants never could complain of.

D

COUNSELS' ARGUMENT IV, PAGE 58

In Proceeding to a Trial on the Merits * * * When Mississipi Practice Permitted Only Dismissal With Prejudice, After Petitioners Declined to Proceed Further.

The Chancery Court entered a decree dismissing the original bill with prejudice, and then adjudicated the rights of the Cross-Complainants. Whether the adjudication should have been in one or two decrees was immaterial. Counsel admits that the decree as to his clients would be a dismissal with prejudice. Petitioners would take nothing, and it would be immaterial with them whether the Court heard evidence on the cross-bills and made one decree fit all of the issues before the Court. Furthermore, Petitioners are in no position to complain of the procedural steps taken after they walked out and declined to participate. Any objection as to procedure should have been made before the lower Court, and exception fully noted. It is admitted by counsel that after they declined to submit their case, after the Court had declined to permit them to dismiss, then, that the only decree that the Court could enter would be a dismissal with prejudice. That means that they were then and there adjudicated not to be the owner of the land, or any interest therein, and that all of the Defendants would be unaffected by the original adverse claim of the Petitioners. The Supreme Court, by its opinion, and by judgment affirmed the decree of the Chancery Court in its entirety.

E

COUNSELS' ARGUMENTS V-X INCLUSIVE, PAGE 60, *et seq.*

Counsels' argument on Points V-X, inclusive, relate- to the cross-bill of the Ridgeways, the cross-bill of the Gulf, and the effect of the Court's decree thereon. For brevity,

we adopt the separate responses being filed on behalf of the Gulf and the Ridgeway Group on these wrongful contentions of counsel. We do again emphasize that the landowners, who are Respondents, were parties to the litigation, and in privity of contract with the mineral lessees. There could be no adjudication that the Cross-Complainants had valid leases and mineral interests without at the same time adjudging, or at least without an adjudication having the necessary effect of holding, that these Respondents were the true owners of the land and had a right to execute these mineral leases. One thing is certain, and that is that the final decree adjudicated that the Complainants take nothing, and therefore, as between the Petitioners herein and the Respondents, our clients owned the lands, and all the minerals, unaffected by the adverse claim of Petitioners. It could not be adjudicated that the Gulf had a valid lease, for illustration, from the Talmadge D. Lewis family, without also adjudicating that the Talmadge D. Lewis family, Gulf's lessors, owned the land covered by the leases. A simple decree dismissing the original bill, with prejudice, would accomplish that result, on the fundamental issue of ownership of the land, as between Petitioners and Respondents.

VI

Conclusion

Counsel for Petitioners state that the pattern for their petition was set by this Court in its opinion in *Angel* v. *Bullington*, 91 L. ed. 557, Advance Opinions No. 8. This case is more authority for Respondents than for Petitioners. Therein this Court did declare that a State Supreme Court could not "put a Federal claim aside as though it were not in litigation," and so we say here that Learned Counsel cannot inject a Federal question or claim there is a Federal

question by the use of the "talismanic word" constitution. Furthermore, this case accurately holds, as shown by Headnote 2, that "for purposes of diversity jurisdiction a Federal Court is, in effect, only another court of the State." Petitioners had their election in the outset to choose between a State and a Federal Court, provided only they could maintain diversity of citizenship, which we here deny; but assuming that they could state a case of diversity, they only had a choice of two courts and they chose the proper forum to assert an adverse claim or title to lands. We say it was the *only* court having jurisdiction. As stated by the Circuit Court of Appeals for the Eighth Circuit, in *Heck* v. *Nicholas*, 6 Fed. (2d) 10, as shown by the headnotes:

> "1. Constitutional law—State's sovereignty over real property is supreme, including right to establish rules of law and procedure for transfers of title.
>
> "State's sovereignty over real property within its boundaries is supreme, and it may establish rules of law and procedure affecting transfers and settlement of title without violating federal Constitution, provided property is brought under control of its court and reasonable opportunity to be heard given all interested parties.
>
> "2. Action—Action to remove lien or set aside mortgage affecting real property is action *in rem*.
>
> "Action to remove lien or set aside mortgage affecting real property is in principle an action *in rem*.
>
> "3. *Lis pendens*—Nonresident purchaser of note and assignee of mortgage, failing to record assignment before institution of suit to cancel mortgage, held bound by decree therein.
>
> "Nonresident purchaser of note, taking assignment of mortgage of realty securing it, but failing to record his assignment before institution of suit to cancel mortgage and filing of *lis pendens*, under Comp. St. Neb.

1922, Section 8595, Held bound by decree canceling mortgage."

Surely, after filing and prosecuting their state court action from June 10, 1944, to on or about December 12, 1945, and when so many proceedings have been had in the case as hereinbefore in this brief outlined, it would have been highly inequitable and prejudicial to the rights of these Respondents to permit Petitioners to dismiss without prejudice and refile the same suit in the Federal Court, and thereby to continue to prevent these Respondents from realizing on their royalties, or selling any of their mineral rights, or improving their properties as they would normally do in the absence of an adverse claim of this nature.

We say, in brief, and in conclusion, that there is no Federal question upon which this Court could or should assume jurisdiction.

Respectfully submitted.

J. Morgan Stevens,
Jackson, Mississippi;
Ellis B. Cooper,
Laurel, Mississippi,
Attorneys for Said Respondents.

J. R. Buchanan,
A. S. Scott,
Beard and Pack,
Laurel, Mississippi;
Stevens and Cannada,
Jackson, Mississippi,
Of Counsel.